

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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Court of Appeals of the District of Columbia.

OCTOBER TERM, 1914.

No. 2702.

144

HIRAM C. McNEIL, SARAH H. McNEIL, AND ADAM
STEINMETZ, APPELLANTS,

vs.

ROY S. GARY.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED JUNE 4, 1914.

PRINTED JUNE 30, 1914.

Court of Appeals of the District of Columbia.

OCTOBER TERM, 1914.

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In the Court of Appeals of the District of Columbia.

No. 2702.

HIRAM C. McNEIL et al., Appellants,
vs.
ROY S. GARY.

a Supreme Court of the District of Columbia.

Equity. No. 31380.

HIRAM C. McNEIL, SARAH H. McNEIL, and ADAM STEINMETZ,
Plaintiffs,
vs.
ROY S. GARY, Defendant.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, that in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

1

Bill.

Filed October 31, 1912.

In the Supreme Court of the District of Columbia.

Equity. No. 31380.

HIRAM C. McNEIL, SARAH H. McNEIL, and ADAM STEINMETZ,
Plaintiffs,
vs.
ROY S. GARY, Defendant.

To the Supreme Court of the District of Columbia:

Plaintiffs state as follows:

1. The plaintiffs, Hiram C. McNeil, Sarah H. McNeil and Adam Steinmetz, are citizens of the United States and residents of the District of Columbia, and bring this suit in their own right.

2. The defendant, Roy S. Gary, is a citizen of the United States and a resident of the District of Columbia, and is sued in her own right.

3. That B. Francis Saul, Rosina M. May, Mary C. Saul, Teresa M. Saul, Agnes A. Saul, John A. Saul and William J. Saul became the owners of a part of a tract of land known as "Maple Grove," situate in the County of Washington, District of Columbia, which they caused to be subdivided into blocks and lots and called the same "Saul's Addition to the City of Washington," and on the 16th day of April, A. D. 1908, caused a plat of said subdivision to be duly recorded in the office of the Surveyor for the District of Columbia, in County Book No. 35, at Page 11. That subsequently, at divers times, some of the lots in said subdivision were resubdivided into smaller lots, all of which appears of record in said Surveyor's office.

4. That the plaintiffs, Hiram C. McNeil and Sarah H. McNeil, are the owners in fee simple as joint tenants, of lot numbered forty-seven, in square numbered twenty-nine hundred and twenty-one, of said subdivision, which said lot was conveyed to them on the 29th day of March, A. D. 1910, by Melvin H. Herriman and wife, by deed duly recorded in Liber No. 3315, at folio 271, et seq., one of the Land Records of the District of Columbia, and that the said lot was conveyed to the said Melvin H. Herriman by B. Francis Saul and others, the aforesaid original owners of said subdivision, by deed dated October 28, 1909, and of record in Liber 3291 at folio 125, et seq., one of the Land Records of the District of Columbia. That said lot 47 is improved by a comfortable dwelling house, valued at not less than thirty-five hundred dollars, and plaintiffs, Hiram C. McNeil and Sarah H. McNeil, reside therein.

5. That the plaintiff, Adam Steinmetz, is the owner in fee simple of lot numbered 41, in square numbered 2921, of said subdivision, which said lot was conveyed to him on the 10th day of April, A. D. 1909, by B. Francis Saul and others, the aforesaid original owners of said subdivision, by deed duly recorded in Liber 3230 at folio 270, one of the Land Records of the District of Columbia. That said lot 41 is improved by a comfortable dwelling house valued at not less than thirty-five hundred dollars, and plaintiff, Adam Steinmetz, resides therein.

6. That the defendant is the owner in fee simple of lot numbered 45 in said square numbered 2921, in said subdivision, the same having been conveyed to her by deed dated the 14th day of October, A. D. 1909, from the said B. Francis Saul and others, the aforesaid original owners of said subdivision, and of record in Liber 3283 at folio 45, et seq., one of the Land Records of the District of Columbia.

7. That the said subdivision is one of the most desirable in the District of Columbia for residence purposes, and a great majority of the lots in said subdivision have been sold by the original owners thereof and are now used exclusively and only for residence purposes, and handsome residences, costing from

three thousand five hundred dollars to more than twenty thousand dollars, have been erected on a majority of the lots.

8. That in the deed from the said B. Francis Saul and others, the aforesaid original owners of said subdivision, to the said Melvin H. Herriman, and from the said Herriman and wife to plaintiffs Hiram C. McNeil and Sarah H. McNeil, and in the deed from the said B. Francis Saul and others to plaintiff, Adam Steinmetz, and to the defendant, as well as in all other deeds given by the said B. Francis Saul and others, the original owners of said subdivision, conveying lots in said subdivision, among other covenants, are the following, to wit:

"And the said party of the second part (the grantee) by accepting these presents and in consideration of the above grant, doth hereby covenant, promise, and agree, for herself (himself or themselves) her (his or their) heirs, executors, administrators and assigns, to and with the said parties of the first part (the grantors), their heirs and assigns, as follows:

"First. That not more than one dwelling house shall be erected on said lot, and that no apartment house nor flats of any description shall be erected on the same.

"Second. That such building shall not cost less than \$3,500.00 to build, and shall not be used for manufacturing, mechanical or business purposes of any kind whatsoever, but solely for dwelling purposes.

That it was further covenanted in said deeds that the foregoing covenants should be effective and remain in force for a term of twenty years from January 1, 1906.

Plaintiffs say that said covenants were covenants running with the land and were intended for the common benefit of all the lot owners in said subdivision, and were made in furtherance of a general plan or scheme for the better adaptation of said subdivision for a residence district exclusively, and of which, plaintiffs are
4 advised and believe, defendant had notice at the time of her purchase of said lot, and plaintiffs further say that said covenants formed part of the consideration of plaintiffs' purchase of their said lots.

9. Plaintiffs are advised and believe that all purchasers of lots in said subdivision from the said B. Francis Saul and others, the said original owners of said subdivision, at the time of purchasing the same, signed an agreement with the said B. Francis Saul and others, or their agents, containing the following provision, to wit:

"The purchaser in accepting and signing this paper agrees that not more than one dwelling house shall be erected on said lot, that no apartment house nor flats of any description shall be erected on same, that such dwelling shall cost not less than \$3,500 to build, and it shall not be used for manufacturing, mechanical or business purposes of any kind, that it shall not be rented, leased, sold, transferred or conveyed unto or in trust for any negro or colored person, and that these covenants shall be effective and remain in force for the term of twenty (20) years from January 1, 1906, and no longer.

10. That there is now erected on the front of defendant's said lot, numbered 45, a dwelling house valued at not less than thirty-five hundred dollars, and defendant is erecting, or causing to be erected, on the rear of said lot, and within one hundred and fifty feet of plaintiffs' residences, a one story and loft frame stable, about thirty-four feet long and thirty feet wide, to be, if completed, of the value of about three hundred dollars, containing five stalls for horses and a large space for wagons and vehicles, and plaintiffs are informed and believe, and therefore aver, that said defendant designs and intends to use said stable for the purpose of stabling the horses and storing the wagons used in a certain drayage or express business, and plumbing business, now conducted by the defendant, or her

5 husband, plaintiffs are not advised which; and plaintiffs are advised and believe, and therefore aver, that the erection of said stable, as well as the proposed use thereof, will constitute a violation of the aforesaid covenants contained in said deed and the aforesaid agreement signed by purchasers of lots in said subdivision, and will be in violation of the general plan or scheme of improvement of said subdivision, and plaintiffs say that the proposed erection and use of said stable is without the consent of the plaintiffs and in violation of their rights as owners of lots in said subdivision. Plaintiffs further say that the proposed use of said stable by defendant will constitute an offensive and obnoxious nuisance by reason of the unwholesome odors which will exist upon and emanate from said stable, and will cause plaintiffs, and the adjoining lot owners, irreparable injury, and plaintiffs say that they are without adequate relief save in a court of equity.

Wherefore, premises considered, plaintiffs pray:

1. That a subpoena may issue out of this honorable Court directed to the defendant, Roy S. Gary, commanding her to appear and answer this petition.

2. That a rule be issued commanding the said defendant to show cause on or before a day certain why she should not be enjoined from further erecting or causing to be erected the said stable on said lot numbered forty-five.

3. That on a final hearing of this cause, the said defendant may be perpetually enjoined from erecting or causing to be erected the said stable on said lot numbered forty-five.

4. That plaintiffs may be granted such other and further relief as to the court may seem meet and proper and the nature of the case may require.

HIRAM C. MCNEIL.
SARAH H. MCNEIL.
ADAM STEINMETZ.

J. BARRETT CARTER,
Attorney for Plaintiffs.

6 DISTRICT OF COLUMBIA, ss:

We do solemnly swear that we have read the annexed bill, by us subscribed, and know the contents thereof; and that the statements

of fact therein made as upon personal knowledge are true, and those made as upon information and belief, we believe to be true.

HIRAM C. MCNEIL.
SARAH H. MCNEIL.
ADAM STEINMETZ.

Subscribed and sworn to before me this 30 day of October, A. D. 1912.

[SEAL.]

CHARLES R. DUEHAY,
Notary Public, D. C.

Rule to Show Cause.

Filed October 31, 1912.

* * * * *

Upon motion of the plaintiffs in the above entitled cause, it is, this thirty-first day of October, A. D. 1912,

Ordered, That the defendant Roy S. Gary be, and she hereby is, required to show cause, on or before the 8th day of November, A. D. 1912, at ten o'clock, A. M., why she should not be enjoined from erecting, or causing to be erected, a certain stable mentioned in the bill of complaint filed herein, on lot numbered forty-five, square 2921, "Saul's Addition to the City of Washington," as prayed in said bill of complaint; provided, a copy of this order be served on the said defendant at least two clear days before said 8th day of November, A. D. 1912.

JOB BARNARD, *Justice.*

Marshal's Return.

7 Served copy of within rule to show cause on Roy S. Gary personally.
Oct. 31, 1912.

AULICK PALMER, *Marshal.*
C. R. S.

Answer to Rule to Show Cause.

Filed November 8, 1912.

* * * * *

The defendant in answer to the rule to show cause issued herein respectfully states:

1. That the stable which is referred to in the bill of complaint, is being erected by this defendant through a competent contractor, and under a building permit regularly issued by the Inspector of Buildings for the District of Columbia; that said stable is being constructed upon plans and specifications upon which said permit was issued, and is equipped with modern sanitary appliances, and is therefore a lawful structure to be erected upon her said property.

2. Further answering said rule, she states that after she had commenced the building of said stable, the work thereon was delayed at the instance of the plaintiffs and other parties, but that shortly before the filing of said suit, she ordered the contractor who was building said stable to complete the same; that upon being notified of the filing of this suit, she was advised by her Attorney that she was not required to discontinue the work of building said stable for the reason that no restraining order had been issued, and there was no bond therefore to protect her against the loss and increased expense which would be occasioned by stopping the contractor in his work; that her Attorney as she is informed by him and believes,

8 thereupon wrote a letter to the Attorney for the plaintiffs notifying him that because there was no bond for the protection of this defendant, he had advised her to proceed with said building, and that she would do so unless and until restrained; that said building has since the filing of said suit been completed, and the erection thereof is now complete.

3. And for further answer to said rule, this defendant states that the erection and proposed use of said stable does not constitute a nuisance; that the said stable has been erected as above stated, with due regard to its proper sanitation with the object of preventing any obnoxious or unhealthy odors arising therefrom; that the stalls are equipped with concrete floors, with gutters and raised strips to render the same more sanitary and prevent noise; that the property in question is in a community where the houses are built detached from other houses, and the lots are of sufficient width and depth to enable the residents to erect stables and out-buildings of other description, and there are in fact a number of other stables, garages, chicken houses and other out-buildings erected upon the lots in said sub-division, and especially in the square No. 2921 in which this defendant's property lies, and in the squares adjacent thereto; that in said square and a short distance from the property of the plaintiffs, one G. B. Mullin has erected a stable which has been used for the stabling of horses for several years, and as this defendant is informed and believes, the same was being used as a stable by said Mullin at the time the plaintiffs purchased their said property; that the said plaintiffs had not taken any action nor has any other property owner in said sub-division taken action to enjoin the use of said

9 stable by said Mullin, or to enjoin any of the other persons who have built and used stables, garages and other out-buildings in said sub-division; that at the time of the purchase of the defendant's property the agent of the grantors in said deed wherein said covenant is contained, stated that a stable could be built upon said property, and in examining the properties in said sub-division for the prospective purchase, in co-operation with said agent, this defendant secured this particular lot in the eastern end of said sub-division where the lots have greater depth than elsewhere in said sub-division, to give room for said stable.

4. And in consideration of the foregoing this defendant prays that said rule to show cause may be discharged.

ROY S. GARY.

DISTRICT OF COLUMBIA, ss:

Roy S. Gary, being first duly sworn, on oath deposes and says, that she has read the foregoing answer by her subscribed, and that the facts therein stated are true to the best of her knowledge, information and belief.

ROY S. GARY.

Subscribed and sworn to before me, a Notary Public in and for the District of Columbia, this 7th day of November, A. D. 1912.

[SEAL.]

ROLAND C. BOOTH,
Notary Public, D. C.

Answer of Defendant to Bill of Complaint.

Filed July 24, 1913.

* * * * *

The defendant for answer to the Bill of Complaint herein filed, says:

1. She admits the allegations of paragraph 1.
2. She admits the allegations of paragraph 2.
3. She admits the allegations of paragraph 3.
- 10 4. Answering paragraph 4, this defendant is not advised as to the truth of the facts therein alleged and if the same be material, demands strict proof thereof.
5. This defendant is not advised as to the truths of facts related in paragraph 5 and demands strict proof thereof.
6. This defendant admits the allegations of paragraph 6.
7. Answering paragraph 7, this defendant admits that the said subdivision is desirable for residence purposes; she is not informed whether or to what extent any of the lots in said subdivision have been sold by the original owners thereof, but she presumes that such is the case. She denies, however, that the said lots are used exclusively for residence purposes and that residences costing from \$3,500 to \$20,000.00 have been erected on a majority of the lots, and if this be material demands strict proof thereof.
8. Answering paragraph 8, this defendant is not informed of the facts stated therein and demands proof thereof.
9. Answering paragraph 9, this defendant is not informed as to the facts therein alleged and demands strict proof thereof.
10. Answering paragraph 10 of said Bill of Complaint, this defendant admits that a dwelling house has been built on her lot as stated in said paragraph. She also admits that at the time said Bill of Complaint was filed, she was causing to be erected on the rear of said lot, a one-story and loft frame stable about 34 feet long and 30 feet wide to be of the value of about \$300 containing five stalls for horses and a space for wagons and vehicles. She also admits that it was intended to use said stable for the purpose of stabling horses and wagons used in an Express business and Plumbing business conducted by her husband; that said Ex-
- 11

press and Plumbing business is being conducted at the place of business of her said husband in Washington, D. C., and not upon the said lot; that only two horses used in said business have been kept in said stable; that said stable has been used and was intended to be used to stable one horse which is used by this defendant solely for family uses.

Further answering, this defendant says that the said horses are used by this defendant and her family for family use and for driving purposes at times when they are not used in said business; that they are not brought to said stable upon said lot for the purpose of using them in connection with said Plumbing business or Express business, but solely for the purpose of stabling them and for having them conveniently located when it is desired to use them for family purposes.

Further answering the said paragraph, this defendant says that the allegations that the said stable will constitute a nuisance is untrue; that the said stable was built under a building permit properly issued by the building inspector of the District of Columbia after the plans thereof had been submitted to him. That proper provisions for sanitation and to prevent any nuisance in connection therewith were taken in the construction of said stable and have been taken in its use.

Further answering said paragraph, this defendant denies that said stable will cause irreparable injury to the plaintiffs and furthermore she alleges that the said stable will not cause any special injury to the plaintiffs.

Further answering said Bill of Complaint, this defendant states that the plaintiffs and the other persons holding lots in said
12 subdivision have, by their uniform conduct since the said subdivision was made, waived the restrictive covenants contained in the Deeds as set forth in said Bill of Complaint; that since the said subdivision was opened other stables have been built and used upon lots in said subdivision and numerous garages have been built and used in said subdivision as well as other out-buildings; that said stables and garages have been used for the stabling of horses and storing of automobiles used in the respective business employments of persons living in said subdivision; and this defendant refers to the fact that such stables have been built and used by G. B. Mullin at 13th & Crittendon St.; Ralph L. Galt at 1500-01 Dellafield St.; Mrs. W. M. Galt at 1502-04 Dellafield St., and that such garages have been built and used by M. L. King, 5100 14th St.; Horace G. Smithey, 4805 14th St.; George W. Talbert, 1411 Decatur St.; Bradford Knapp, 1215 Crittendon St.; Thomas Grant, 1408 Dellafield St.; George W. Riley, 14th & Iowa Avenue, and by other persons.

Further answering said Bill of Complaint, this defendant avers that before purchasing the lot in said subdivision upon which said stable was built, this defendant communicated her intention of building said stable to the agent of the owners of said subdivision by whom the sale was made to your defendant, and she was advised

that the said stable was not within the prohibition contained in said Deeds in said subdivision and she thereupon purchased and paid for said lot in good faith upon such representations.

ROY S. GARY.

RALSTON & RICHARDSON,
Att'ys for Deft.

DISTRICT OF COLUMBIA, ss:

Subscribed and sworn to before me, a Notary Public, in and for the District of Columbia, this 3d day of July, 1913.

13

[SEAL.]

FRENCH KIRBY,
Notary Public, D. C.

Replication.

Filed August 4, 1913.

* * * * *

The plaintiffs hereby join issue with the defendant.

J. BARRETT CARTER,
Attorney for Plaintiffs.

Opinion.

Filed March 5, 1914.

* * * * *

The bill in this case seeks to enjoin the defendant from erecting on lot 45 in square 2921 in Saul's Subdivision, a one story and loft frame stable to be used for the purpose of stabling horses and storing wagons used in the drayage or express business, conducted by defendant's husband, said erection being alleged to be in violation of covenants in defendant's deed to said property, which provide:

First. That not more than one dwelling house shall be erected on said lot, and that no apartment house nor flats of any description shall be erected on the same.

Second. That such building shall not cost less than \$3,500.00 to build, and shall not be used for manufacturing, mechanical or business purposes of any kind whatsoever, but solely for dwelling purposes."

A demurrer to the bill was sustained by another justice of this Court, which ruling was reversed, by a divided court, in *McNeil v. Gary*, 40 App. D. C., 397.

14 Upon the return of the case to this Court, an answer was filed and testimony was taken which establishes to the satisfaction of this Court that the defendant has erected a stable on the rear of the lot in question, to be used for business purposes. Practically the only question argued at the bar on the final hearing by counsel was: should the final decree order the stable already erected to be removed, or should it merely prohibit its use for business purposes.

From the opinion of the majority of the Court of Appeals, delivered by Mr. Justice Robb, the following quotation is significant:

"In the first place, the provision that not more than one dwelling house shall be erected on a lot was intended to exclude the erection of other structures. This is made manifest by the second clause of the first covenant, that no apartment nor flat shall be erected. The parties evidently feared that an apartment house or flat might be regarded as a dwelling house within the meaning of the preceding clause, and hence expressly excepted it from said class. The first restriction in the second covenant, that no such building, that is, no such dwelling house, shall cost less than \$3,500, emphasizes what was apparently in the minds of the parties, that this subdivision should be devoted to a good class of dwellings. The next clause prevents, in terms, the use of any dwelling house for manufacturing, mechanical, or business purposes of any kind. It seems to us that no one purchasing one of these lots and accepting a deed containing these covenants could reasonably fail to understand that he could not do in one way what he was forbidden to do in another; in other words, that the provision that no more than one dwelling house should be erected on a lot, coupled with the provisions that it should cost not less than \$3,500, and not be used for any other purpose, meant that this subdivision should be devoted to dwelling, and not business, purposes. The result, and not the manner of achieving it, is material. Unless these covenants are to be given this construction, they become a mere jumble of words, and their obvious intent is frustrated."

It would seem from this quotation that the object of the restriction was to permit the erection of only one dwelling house on each lot, (thus excluding apartment houses or flats); and that such dwelling houses should cost not less than \$3,500.00. Next, that no

erection should be used for manufacturing, mechanical, or
15 business purposes. There is no intimation in the opinion of

Mr. Justice Robb that the ordinary subsidiary buildings essential to the enjoyment of a home in a residential section, such as woodsheds, garages, stables or chicken houses, are prohibited. So it may be assumed that a private stable, like a stable for the use of the owner of the lot for his private, and not for his business purposes, would not come under the ban of the covenants.

Now, conceding that the stable erected in the instant case does fall under the condemnation of the covenants of the deed as construed by the Court of Appeals, should the Court order it to be removed, when it could at once be reconstructed as a private stable, appurtenant to the defendant's residence on the front part of the lot? The answer seems to be given by the Massachusetts Supreme Judicial Court in the case of *Riverbank Improvement Co. v. Bancroft*, 34 L. R. A. (N. S.) 730, where the Court said:

"The final question respects the relief to be granted. It is argued by the defendants that the building itself does not in any way conflict with the restrictions; that neither in size, location, nor in the materials of which it is constructed does it violate the restrictions,

and that the only violation consists in its use. And hence they say that the decree should not order the removal of the building but only forbid its use as a garage. While it appeared that the building was erected principally for the automobile, yet it also appeared that it has been 'used as a place to keep vegetables, double windows, blinds, and other minor household things, and was so intended to be used at the time of its erection;' that 'it has also been used as a place (in which) to freeze ice cream and do other small household things;' and that 'during the summer, barrels and other things about the yard are locked up there.' Whether or not, as claimed by the plaintiffs, these facts are contradictory of the pleadings, there can be no doubt that they may be properly taken into consideration on the question of the kind of relief. It further appears that the building is not a nuisance and does not obstruct the view from the windows of the houses in Block B.

"Even if the defendants should be ordered to take this building down, upon the ground that it was originally constructed for a use inconsistent with the restriction, it is manifest that they might immediately erect one exactly its duplicate for the purposes for which, as above stated, it was intended to be used in part and has been so used. But it is to be noted that the restriction forbade the erection of the building for a garage as well as its use for that purpose.

"Under these circumstances we think justice will be done by a decree which will simply compel the defendants to cease the illegal use, and, further, to remove the building unless it be used for a purpose not inconsistent with the restriction. There should be a decree for the plaintiffs forbidding the use of this building as a garage or a storehouse for an automobile, and for its removal unless it be used for a purpose not inconsistent with the restriction; and for costs."

Accordingly a decree will be entered enjoining the defendant from using the structure erected for any manufacturing, mechanical or business purposes.

ASHLEY M. GOULD, *Justice*.

Final Decree.

Filed March 20, 1914.

* * * * *

This cause came on to be further heard at this term; and thereupon, upon consideration thereof, it is this 20th day of March, A. D. 1914,

Adjudged, ordered and decreed as follows, namely: That the said defendant, Roy S. Gary, and her agents, servants and assigns, be, and each and all of them are hereby, restrained and enjoined, for a period of twenty years from and after January 1, 1906, from using, or permitting the use of, for any manufacturing, mechanical, or business purposes whatsoever, the building or structure alleged in the bill of complaint to be in the course of erection, and appearing

from the evidence adduced to have been fully erected and completed after the filing of said bill of complaint and the service on the defendant of the rule to show cause issued thereon, on the rear of lot numbered forty-five (45) in square numbered twenty-nine hundred and twenty-one (2921) in the subdivision known as "Saul's Addition to the City of Washington," in the District of Columbia.

17 And it is further adjudged, ordered and decreed that the cost of this cause be taxed against the said defendant Roy S. Gary.

From the foregoing decree the plaintiffs, by their attorney, in open court, pray an appeal to the Court of Appeals of the District of Columbia, which is hereby allowed, and the bond for costs on appeal is hereby fixed at one hundred dollars (\$100).

ASHLEY M. GOULD, *Justice*.

Memoranda.

April 10, 1914.—Appeal bond approved and filed.

April 20, 1914.—Time to submit statement of evidence extended to May 20, 1914, and time to file transcript of record extended to June 10, 1914.

May 20, 1914.—Statement of Evidence signed and filed.

Assignment of Error.

Filed May 20, 1914.

* * * * *

Now comes the plaintiffs (appellants) in the above entitled cause and assign error committed by the trial court as follows:

The Court erred in not decreeing that a mandatory injunction be issued herein directing and commanding the defendant to remove the stable the erection of which was sought to be enjoined in this suit.

J. BARRETT CARTER,
Attorney for Plaintiffs.

18

Designation of Record.

Filed May 20, 1914.

* * * * *

The Clerk, in making up the record on appeal in the above entitled cause, will please include the following:

1. The bill of complaint.
2. Rule issued October 31, 1912.
3. Answer to rule (filed November 8, 1912).
4. The answer of Defendant to the bill of complaint.
5. The plaintiffs' replication to the defendant's answer.
6. The opinion of Justice Gould.

7. The final decree and notation of appeal therefrom.
8. Memorandum of filing and approval of appeal bond.
9. Order extending time to present statement of evidence and to file record on appeal.

10. Assignment of error.

11. Two photographs and a plat filed herein marked, respectively, Plaintiffs' Exhibit- 1 and 2 and Plaintiffs' and Defendant's Exhibit 1.

(Application will be made in due course to the Court of Appeals that the said photographs and plat may be produced in the original form for examination and inspection by that Court, they not being capable of convenient reproduction in the record.)

12. This designation.

J. BARRETT CARTER,
Attorney for Plaintiffs.

Service of a copy of the above designation acknowledged this — day of May, A. D. 1914.

RALSTON & RICHARDSON,
Attorneys for Defendant.

19 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 18, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 31380 in Equity, wherein Hiram C. McNeil, Sarah H. McNeil and Adam Steinmetz are Plaintiffs and Roy S. Gary is Defendant; as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 29th day of May, 1914.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

20 In the Supreme Court of the District of Columbia.

Equity. No. 31380.

HIRAM C. MCNEIL, SARAH H. MCNEIL, and ADAM STEINMETZ
vs.
ROY S. GARY.

Statement of Evidence.

For Plaintiffs.

Testimony of B. F. Saul.

Testifies that he was one of the original owners of Saul's Addition, and all the deeds to lots in the subdivision mentioned contained the following special covenants set forth in the deed marked "Plaintiff's Exhibit No. 1."

"First. That not more than one dwelling-house shall be erected on said lot, and that no apartment house nor flats of any description shall be erected on the same.

"Second. That such building shall not cost less than \$3,500.00 to build, and shall not be used for manufacturing, mechanical or business purposes of any kind whatsoever, but solely for dwelling purposes.

"Third. That said property shall not be rented, leased, sold, transferred or conveyed unto or in trust for any negro or colored person or any person of negro extraction.

"And the said parties hereto do hereby agree that the above covenants shall be effective and remain in force for the term of twenty (20) years from January 1, 1906, and no longer."

These covenants were made in furtherance of a general plan or scheme for the better adaptation of the subdivision for a residence district exclusively. Has not figured up recently the proportion of lots which have been sold in the subdivision, but
21 should say 80 per cent. In their deeds to the remaining lots they will incorporate the same covenants. About the only covenants that are changed at all are the building lines on certain streets; on some streets they are different from what they are on others.

Testimony of Hiram C. McNeil.

Testifies that he is one of the plaintiffs and now resides on lot 47 in square 2921 of Saul's Addition.

At the time this bill was filed, Mr. Gary's stable, the erection of which this suit is to enjoin, had not been quite finished. It had partly been torn down on account of the negotiations which the committee which had this matter in charge, or some members of it, had had with Mr. Gary. It stood like that for some time, and this committee was supposed to have prepared to bring an injunction

suit immediately, if the work started; but the work started, and for some reason which they could not find out, the suit did not begin. It takes only a day or two to run up a shed like that, the walls had probably been replaced, and possibly they were working on the roof or something like that. The stable was completed immediately after the suit was filed; there was no change in the work. Mr. Gary has used the stable as a stable since its completion. The use of that stable affects witness's property for residence purposes in just the way that any rather objectionable looking building, and an objectionable, more or less, noisy business near a house would affect it. There is necessarily more or less confusion morning and evening as the wagons are hitched up and taken out, and brought back again, and colored men are about. The stable itself is not a thing of beauty in such surroundings; in fact, it is very noticeably out of place. Is quite well aware that there are other stables in use in this subdivision

22 and that stables were there at the time he bought there; they are private stables, with not more than one horse. Cannot say as to there being two or three horses in Galt's stable; does not know that Galt has a stable. That is a considerable distance from his home; all he knows about it is where two Galt houses are. Presumes they have stables, but does not know; does not know that they have stables now. Presumes they use automobiles; if he had as much money as they are said to have he would. There is a garage on the corner of 13th and Crittenden Streets, in the same block with witness. Does not know who owns that property; a Mr. Collamer lives there and claims it; does not know in what business he is engaged.

Redirect examination:

The garage on Collamer's place is a small building, just large enough to hold an auto, standing on the alley; the auto he has is a small one; witness has seen it. There is nothing to his knowledge in this subdivision that he would call business except the Gary lot, nor any suggestion of it, nor has he ever heard anything that would indicate that.

Testimony of Adam Steinmetz.

Is one of the plaintiffs and resides at 1223 Crittenden Street, Northwest, in Saul's Addition; has resided there since September, 1909. Before this suit was filed, witness had heard rumors that Mr. Gary was about to erect a stable on the rear of his lot, and witness made it a point to see Mr. Gary and get it direct from him whether it was so or not. On a Saturday afternoon during the latter part of July saw Mr. Gary on the back of his lot, went over and talked to him, and asked whether he was going to erect a stable out there. Mr. Gary informed him that his plans were to erect a stable, that he intended to keep five horses and use them in his business.

23 Witness asked Mr. Gary if he had read his deed and if his deed was not the same as those of witness and of the others out there. Mr. Gary said he thought that his deed was the

same as witness's and everyone else out there. Mrs. Gary was not present at that time. Does not know that he could tell who has acted for Mrs. Gary, aside from her husband, during the negotiations relative to the objections made to the erection of this stable. Imagines Mr. Gary has been about as active as anyone, besides her attorney, in looking after Mrs. Gary's affairs. Witness read over the contract which he signed prior to purchasing his lot out there, which is practically the same as the wording of other deeds. The restrictive covenants had something to do with his purchasing the property; that is one of the main reasons he went out there, because it assured him of getting into a strictly residential section. At the time this suit was filed, the foundations of Mr. Gary's stable, consisting of stones, corner stones, and solid foundation and the sills were laid; the sides, the studdings on the sides were up, and a few boards. The stable has now been completed and is being used. Recently has seen Mr. Gary take out three horses every morning and he hitches them to wagons which are lettered, "Mt. Pleasant Express Company, 3120 14th Street." One wagon that he uses is not lettered, although it has a license number. During the winter he had five horses, three wagons, and two buggies out there, one buggy that he used every day and a double-seated buggy. That stable is about 130 to 140 feet back of witness' back door, right towards the north. No other lot or building that witness knows of in this subdivision has been used for business purposes. This is the only violation of the covenant that he knows of.

Testimony on Behalf of Defendant.

Note by Examiner.

24 "At the last hearing Exhibit 3 was offered in evidence subject to exception in case it should appear that it was not signed by Mrs. Gary. Counsel for the defendant now admits that it is Mrs. Gary's signature and consents to its being offered in evidence.

"By consent of the parties to the above-entitled cause, a plat of Saul's Subdivision, as it now exists, is introduced in evidence, and is marked Plaintiffs' and Defendant's Exhibit No. 1."

By stipulation of counsel, a photograph of the stable in question, taken by Mr. Amos Tyree on July 4, 1913, and another photograph of the same stable taken by the same person on July 19, 1913, were offered in evidence and marked, respectively, Exhibit No. 4 and Exhibit No. 5.

Testimony of Walker L. Gary.

He is the husband of Mrs. Gary, the defendant in this suit, and is engaged in the plumbing and tinning business, and also has an express business at 3111 Fourteenth Street. In his plumbing or express business he never conducts business on the property in ques-

tion in this suit. For instance, in his express business he does not take orders or anything of that kind at his house. When this property was bought by Mrs. Gary, he participated in the purchase, so far as advising her and examining the property and seeing the agent were concerned; that he bought the property through Sansbury's office; a man by the name of Machen was the agent on the ground at the time; that he was referred to Machen through Sansbury's office; that he called them up and told them he wanted to see about ground and they said he would find Mr. Machen at the office in the subdivision on the day that he was to go out there. They maintained an office in that subdivision and conducted business there.

"Q. Was anything said in your negotiations with Mr. Machen about an intention of building a stable on this lot?

"Mr. CARTER: I object on the ground that what they said cannot bind the plaintiffs in this case and also on the ground that it is hearsay.

"The WITNESS: Yes, sir.

25

"Q. What was said about that?

"Mr. CARTER: I object to that on the grounds previously stated.

"A. I first decided on a lot between 14th and 15th street. My wife had been out to see that lot a couple of times and we had about decided to buy it. When we got out there and went to the lot with Mr. Machen I objected to buying the lot because it was not deep enough for us to put a stable in the rear of it. He tried to show me where Mr. Riley had a stable just below there. He carried me down to Mr. Riley's stable and showed me how far the stable would be from the house, and so forth. I told him that that would not suit me; that it would be too close. He said if I would go down next to Georgia Avenue he had some deep lots in there that he would show me. We went down there and he showed me these deep lots for a stable. They were so deep that a stable would be fifty feet from my house. I decided to take the lot down there because it was deep enough for a stable."

The stable in question was finished shortly after this suit was filed. He keeps on the average of about three horses since the stable was finished; one of them he drives to his buggy; one he uses for the wagon horse, and another is kept for the use of the family. The children go to Sunday School and church on Sunday and drive it in the evening. His boy rides it. That horse he thinks belongs to his oldest daughter. Sometimes when he is very busy he puts that horse to a wagon for the plumbers to use. When they have some material that they have on a job and want to clean up on the same day, they put that horse to a wagon for the purpose. He does not know of any objections made to, or suits filed against, any of the owners of stables or garages in that subdivision. He never heard of any protest or objections against other stables or garages. The

26 stable he has built is 25 feet from the rear of the lot and 35 x 30 feet in size, including the wagon-shed. He keeps three wagons and a buggy in the wagon-shed, and also a surrey; that he does not use the surrey in connection with his plumbing or express business, but only for family use; that he uses the buggy to drive to and from work with, and around during the day; he often uses it in the evening to take his wife out. He was acting for Mrs. Gary in the purchase of this property; they built the stable as man and wife would. In the negotiations which resulted from the objections that were made to the stable, he was acting (as requests the defendant) as a man would toward his wife; he was acting for her, that is, in the same way a man would act for his wife. He was not Mrs. Gary's agent, but he conducted the negotiations for her, and he knew the citizens, the plaintiffs, in this case were objecting to the erection of the stable after he had started and he held it up then for about six weeks for them and started to tear it down on their say-so, and then changed his mind.

In Rebuttal.

Testimony of A. J. Riley.

Is in the meat business and lives at 4815 Iowa Avenue, being lot 39, in square 2808. Knows of no other Mr. Riley in this subdivision who is in the meat business. Is not well acquainted with Mr. Gary, just knows the man; is not to say acquainted with him. Witness has never used his premises for the storing of butcher and market wagons, or for any other business purposes. Has never kept a horse on his premises for business purposes and has never had any wagons at all on his premises.

27

PLAINTIFFS' EXHIBIT No. 1.

Deed in fee simple from B. Francis Saul and Fanny E. Saul, his wife, Rosina M. May (acting in relation to her sole and separate estate), Mary C. Saul, Teresa M. Saul, Agnes A. Saul and John A. Saul, all unmarried, Wm. J. Saul and Elma R. Saul, his wife, to Adam Steinmetz, dated April 10, 1909, properly acknowledged, and recorded May 5, 1909, in Liber 3230 at folio 270, conveying Lot 41 in square 2921 "Saul's Addition" and containing the following special covenants:

"And the said party of the second part by accepting these presents and in consideration of the above grant, doth hereby covenant, promise, and agree, for himself, his heirs, executors, administrators and assigns, to and with the said parties of the first part, their heirs and assigns, as follows:

"First. That not more than on-dwelling house shall be erected on said lot, and that no apartment house nor flats of any description shall be erected on the same.

"Second. That such building shall not cost less than \$3,500.00 to build, and shall not be used for manufacturing, mechanical or business purposes of any kind whatsoever, but solely for dwelling purposes.

"Third. That said property shall not be rented, leased, sold, transferred or conveyed unto or in trust for any negro or colored person or any person of negro extraction.

"And the said parties hereto do hereby agree that the above covenants shall be effective and remain in force for the term of twenty (20) years from January 1, 1906, and no longer."

PLAINTIFFS' EXHIBIT No. 2.

Deed in fee simple from Melvin H. Herriman and Katie May Herriman, his wife, to Hiram Colver McNeil and Sarah Hooper McNeil, as joint tenants, dated March 29, 1910, properly acknowledged, and recorded March 30, 1910, in Liber 3315 folio 271, conveying Lot 47 in square 2921, "Saul's Addition" and containing the same special covenants as in Exhibit No. 1.

28

PLAINTIFFS' EXHIBIT No. 3.

Contract dated August 31, 1909, for the purchase by defendant of lot 45 in square 2921 "Saul's Addition" containing the following special provision, namely;

"The purchaser in accepting and signing this paper agrees that not more than one dwelling house shall be erected on said lot, that no apartment house nor flats of any description shall be erected on same, that such dwelling shall cost not less than \$3,500 to build, and it shall not be used for manufacturing, mechanical or business purposes of any kind, that it shall not be rented, leased, sold, transferred or conveyed unto or in trust for any negro or colored person, and that these covenants shall be effective and remain in force for the term of twenty (20) years from January 1, 1906, and no longer."

The contract is signed as follows: (Signed) "N. L. Sansbury, per S. A. Merchant, Agent. Accepted by (Signed) Mrs. Roy S. Gary, Purchaser. Approved by (Signed) B. F. Saul, Owner."

PLAINTIFFS' EXHIBIT No. 4.

Photograph of stable, taken July 4, 1913.

PLAINTIFFS' EXHIBIT No. 5.

Photograph of stable, taken July 19, 1913.

PLAINTIFFS' & DEFENDANT'S EXHIBIT No. 1.

Plat of "Saul's Addition."

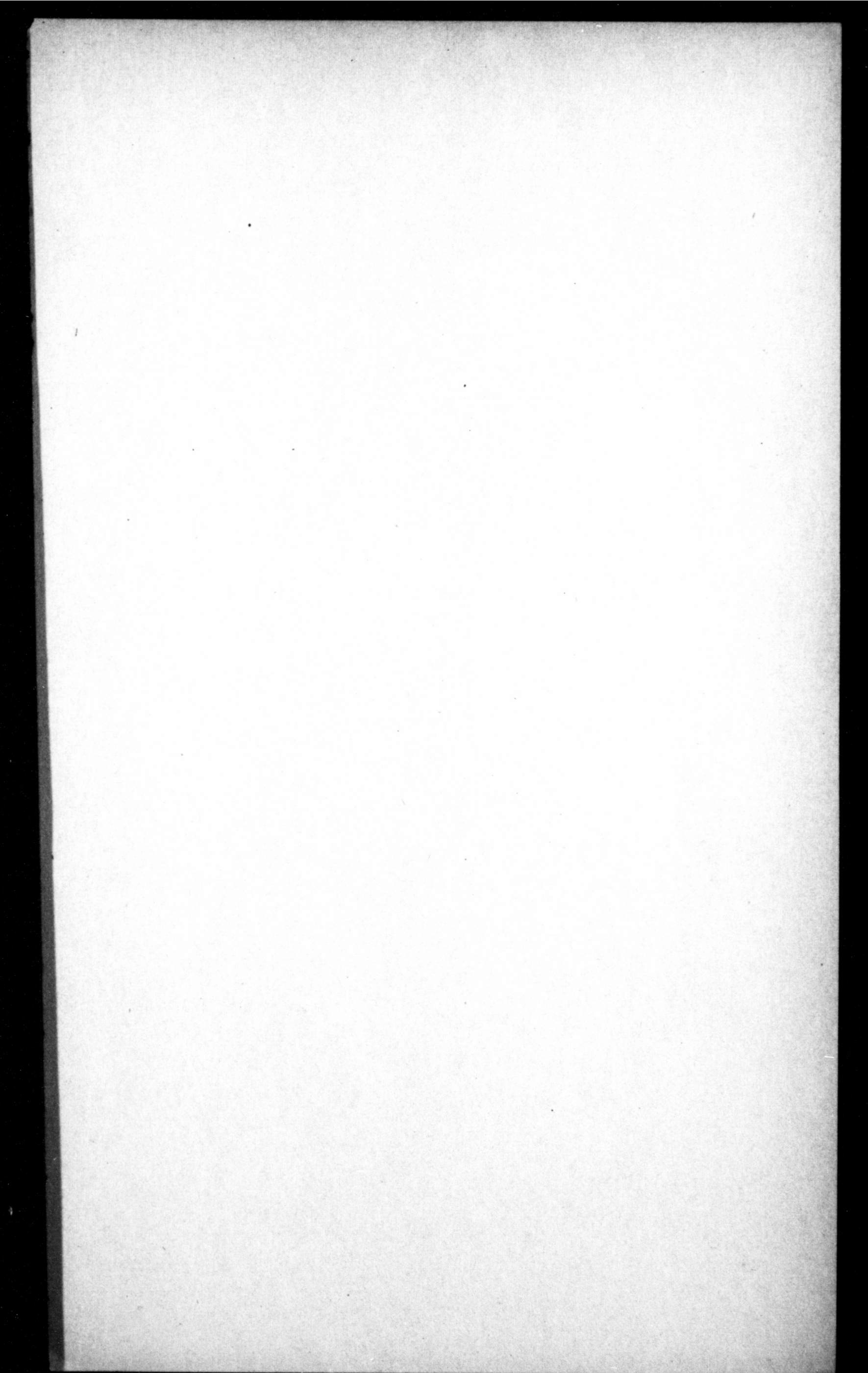
29 I, Ashley M. Gould, one of the Justices of the Supreme Court of the District of Columbia, do hereby certify that the foregoing statement of evidence in duplicate was prepared in accordance with Rule V of the Court of Appeals of the District of Columbia and includes all and only the evidence taken in this case necessary to be included in the record on appeal and essential to the decision on appeal; being such portions of the evidence adduced before an examiner of this Court and filed herein as are essential to the decision of the appeal.

Given under my hand this 20th day of May, 1914.

ASHLEY M. GOULD, *Justice.*

[Endorsed:] Equity No. 31380. Hiram C. McNeil et al., vs. Roy S. Gary. Statement of Evidence under Rule V Court of Appeals. In Duplicate. Law offices of J. Barrett Carter, Evans Building, Washington, D. C.

Endorsed on cover: District of Columbia Supreme Court. No. 2702. Hiram C. McNeil et al., appellants, vs. Roy S. Gary. Court of Appeals, District of Columbia. Filed Jun- 4, 1914. Henry W. Hodges, clerk.



Court of Appeals, District of Columbia.

OCTOBER TERM, 1914.

COURT OF APPEALS
DISTRICT OF COLUMBIA
FILED

SEP. 1--1914

No. 2702.

Henry W. Hodges.
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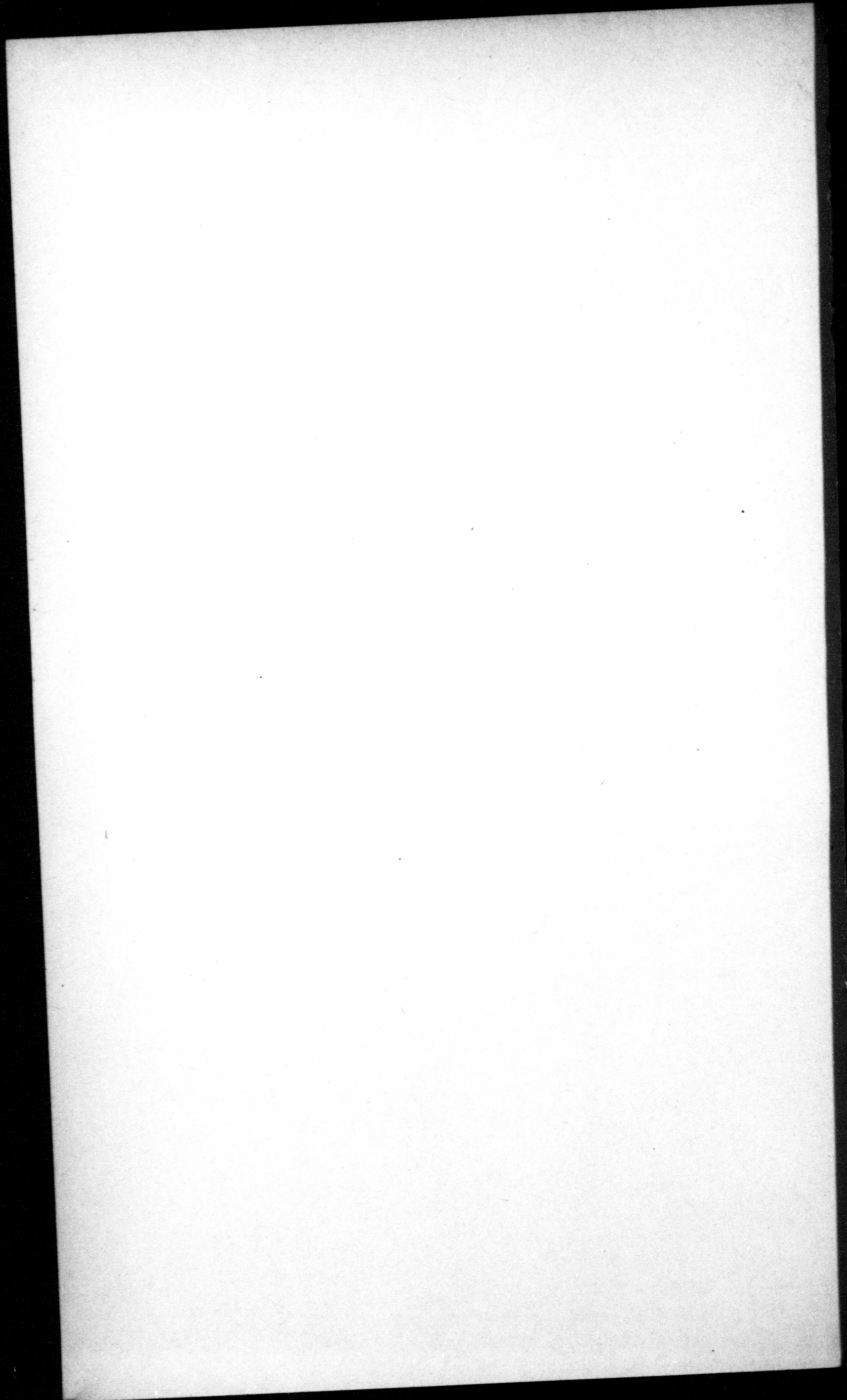
HIRAM C. McNEIL, SARAH H. McNEIL, AND ADAM
STEINMETZ, APPELLANTS,

vs.

ROY S. GARY, APPELLEE.

BRIEF ON BEHALF OF APPELLANTS.

J. BARRETT CARTER,
Attorney for Appellants.



Court of Appeals, District of Columbia.

OCTOBER TERM, 1914.

No. 2702.

HIRAM C. McNEIL, SARAH H. McNEIL, AND ADAM
STEINMETZ, APPELLANTS,

vs.

ROY S. GARY, APPELLEE.

BRIEF ON BEHALF OF APPELLANTS.

Statement of Case.

On October 31, 1912, appellants filed a bill (R., 1) in the equity branch of the Supreme Court of the District of Columbia, alleging that a certain tract of land, known as "Maple Grove," in the county of Washington, District of Columbia, had been subdivided by the owners thereof into blocks and lots, and a plat of the same had been duly recorded in the office of the Surveyor for the District of Columbia, the said subdivision being designated "Saul's Addition of the City of Washington"; that the appellants (plaintiffs) Hiram C. McNeil and Sarah H. McNeil are the

owners in fee simple, as joint tenants, of lot numbered 47, in square 2921, of said subdivision, the same having been conveyed to them by deed, duly recorded, dated March 29, 1910, by Melvin H. Herriman and wife, and was conveyed to the said Herriman by the original owners of the subdivision by deed, duly recorded, dated October 28, 1909; that the said lot 47 is improved by a comfortable dwelling-house, valued at not less than thirty-five hundred dollars, in which house the appellants Hiram C. McNeil and Sarah H. McNeil reside; that the appellant Adam Steinmetz (one of the plaintiffs) is the owner in fee simple of lot numbered 41, in said square 2921, the same having been conveyed to him by the original owners of said subdivision by deed, duly recorded, dated April 10, 1909; that said lot 41 is improved by a comfortable dwelling-house, valued at not less than thirty-five hundred dollars, in which house the appellant Adam Steinmetz resides; that the appellee (defendant) is the owner in fee simple of lot numbered 45, in said square 2921, the same having been conveyed to her by the original owners of said subdivision by deed, duly recorded, dated October 14, 1909; that the said subdivision is one of the most desirable in the District of Columbia for residence purposes, and a great majority of the lots in said subdivision have been sold by the original owners thereof and are now used exclusively and only for residence purposes, and handsome residences, costing from three thousand five hundred dollars to more than twenty thousand dollars, have been erected on a majority of the lots; that in the deeds from the original owners of said subdivision to the said Melvin H. Herriman and from the said Herriman and wife, to appellants Hiram C. McNeil and Sarah H. McNeil and in the deeds from the original owners of the said subdivision to appellant Adam Steinmetz and to the appellee, as well as in all other deeds given by the original owners of said subdivision conveying lots therein, among other covenants, are the following (R., 3):

"First. That not more than one dwelling-house shall be erected on said lot, and that no apartment-house nor flats of any description shall be erected on the same.

"Second. That such building shall not cost less than \$3,500.00 to build, and shall not be used for manufacturing, mechanical or business purposes of any kind whatsoever, but solely for dwelling purposes."

That it was further covenanted in said deeds that the foregoing covenants should be effective and remain in force for a term of twenty years from January 1, 1906; that the said covenants were covenants running with the land and were intended for the common benefit of all the lot owners in said subdivision, and were in furtherance of a general plan or scheme for the better adaptation of said subdivision for a residence district exclusively, and that said covenants formed part of the consideration of appellants' purchase of their lots.

The bill further alleges that all purchasers of lots in said subdivision from the original owners thereof, at the time of purchasing the same, signed an agreement containing the following provision (R., 3):

"The purchaser in accepting and signing this paper agrees that not more than one dwelling-house shall be erected on said lot, that no apartment-house nor flats of any description shall be erected on same, that such dwelling shall cost not less than \$3,500 to build, and it shall not be used for manufacturing, mechanical or business purposes of any kind, that it shall not be rented, leased, sold, transferred or conveyed unto or in trust for any negro or colored person, and that these covenants shall be effective and remain in force for the term of twenty (20) years from January 1, 1906, and no longer."

The bill then alleges that there is now erected on the front of appellee's said lot a dwelling-house valued at not less than thirty-five hundred dollars, and "defendant (appellee) is

erecting, or causing to be erected, on the rear of said lot, and within 150 feet of plaintiffs' (appellants') residences, a one-story-and-loft stable, about 34 feet long and 30 feet wide, to be, if completed, of the value of about \$300, containing five stalls for horses and a large space for wagons and vehicles," and it is averred that said appellee (defendant) designs and intends to use said stable for the purpose of stabling the horses and storing the wagons used in a certain drayage or express business, and plumbing business, now conducted by the appellee (defendant) or her husband, appellants (plaintiffs) are not advised which. It is then averred that the erection of said stable, as well as the proposed use thereof, will constitute a violation of the aforesaid covenants contained in said deed and the aforesaid agreement signed by purchasers of lots in said subdivision and will be in violation of the general plan or scheme of improvement of said subdivision, and that the proposed erection and use of said stable is without the consent of appellants and is in violation of their rights as owners of lots in said subdivision.

The prayers for relief, after the usual prayer for process, were for a rule on the appellee (defendant) to show cause why she should not be enjoined from further erecting or causing to be erected the said stable on said lot, and that on a final hearing she be perpetually enjoined from erecting or causing to be erected the same, and then follows a prayer for general relief.

A rule to show cause was issued (R., 5) and defendant answered the same (R., 5) and also filed a general demurrer to the bill. The court below entered a decree sustaining the demurrer, which decree was reversed on appeal to this court (*McNeil et al. vs. Gary*, 40 App. D. C., 397).

After the case was remanded to the court below an answer to the bill of complaint was filed (R., 7) and testimony taken from which the following facts are established:

The allegations of the bill of complaint, as hereinbefore set forth, were established, and it further appeared from the

testimony adduced and from the defendants' answer to the rule to show cause (R., 5) and her answer to the bill of complaint (R., 7) that the stable, the erection of which was sought by the bill to be enjoined, had been fully erected and completed at the time the answers were filed, that it was erected for business purposes, as alleged in the bill, and was being used for such at the time of final hearing. (See opinion of the court below (R., 9).)

It appears that the defendant's husband, who was acting for defendant in the matter, knew that the citizens in this subdivision, including the plaintiffs, were objecting to the erection of the stable, and after the work was started thereon it was held up for about six weeks on account of said protests, the defendant's husband testifying (R., 18) that he then "started to tear it down on their say-so, and then changed his mind."

At the time the suit was filed and the rule to show cause served on Mrs. Gary the foundation "consisting of stones, corner-stones, and solid foundation and the sills were laid; the sides, the studdings on the side, were up, and a few boards" (Testimony of plaintiff Steinmetz (R., 16)).

The stable is 35 x 30 feet in size and consists of one story and loft, and a large place for wagons and vehicles.

A written opinion was filed by the court below (R., 9) and on March 20, 1914, a final decree was entered (R., 11) enjoining the defendant "from using, or permitting the use of, for any manufacturing, mechanical, or business purposes whatsoever, the building or structure alleged in the bill of complaint to be in the course of erection, and appearing from the evidence adduced to have been fully erected and completed after the filing of said bill of complaint and the service on the defendant of the rule to show cause issued thereon, on the rear of lot numbered forty-five (45) in square numbered twenty-nine hundred and twenty-one (2921) in the subdivision known as 'Saul's addition to the city of Washington,' in the District of Columbia."

From this decree appellants (plaintiffs below) have appealed and have assigned error committed by the court below as follows (R., 12).

Assignment of Error.

"The court erred in not decreeing that a mandatory injunction be issued herein directing and commanding the defendant to remove the stable the erection of which was sought to be enjoined in this suit."

Points and Authorities.

The object of this suit was to prevent the *erection* of the stable in question,—the special prayers of the bill being (R., 4) (omitting the prayer for process and the prayer for general relief):

"2. That a rule be issued commanding the said defendant to show cause on or before a day certain why she should not be enjoined from further erecting or causing to be erected the said stable on said lot numbered forty-five.

"3. That on a final hearing of this cause, the said defendant may be perpetually enjoined from erecting or causing to be erected the said stable on said lot numbered forty-five."

The case was before this court on a former appeal on demurrer to the bill of complaint, the effect of which demurrer was, of course, to admit all the allegations of fact alleged in the bill. The situation is substantially the same now, since all the allegations of fact in the bill are established by the evidence, the only difference being that it now appears that the appellee, in the face of protests by the appellants, and notwithstanding the service of process in this suit, proceeded with, and pressed to completion, the building, the erection of which was sought to be enjoined. It appears that the building was erected for business purposes and was used for business purposes even after the decision of this court hold-

ing that its *erection* was prohibited by the covenants in the deeds to lots in this subdivision.

On the former appeal it was urged by counsel for appellee (case No. 2498, January term, 1913) that the demurrer should be sustained because the bill did not seek to enjoin the use, but the *erection* of the building, counsel using this language (page 12 of their brief) :

"In the bill of complaint it is not charged that the stable in question is unsightly or that it differs from other structures in the same square or that there is any reason that its erection should be enjoined save that the alleged proposed use to be made of it is obnoxious. Nevertheless, the bill does not ask an injunction against the proposed use, but merely that its *erection* be prevented. While it is true that the courts of equity will not permit a suit to fail where upon the case made by the evidence the plaintiff is entitled to relief, but will grant relief under the general prayer, this rule cannot be invoked by the plaintiffs in this case. Their bill of complaint stated no grounds for an injunction against the *erection* of the building. *That was the only specific relief prayed in the bill.*" (Italics ours.)

With the question as to whether or not the *erection* of the stable in question could be enjoined under the covenants in the deeds to lots in this subdivision, being practically the only issue before this court on the former appeal, Mr. Justice Robb, in delivering the opinion of a majority of the court, used this language (40 App. D. C., 397, quoting from page 400) :

"Coming to the merits, we proceeded to determine whether the *erection* of this stable is prohibited by the restrictive covenants affecting this subdivision.
* * * To assume that such purchasers for a moment supposed that these covenants might be construed to mean that stores, moving picture shows, garages, and structures of like character might be erected on those lots, if erected as such, is entirely to disregard the scheme under which this subdivision

was to be developed, and is to convict the purchasers of those lots of a lack of intelligence. In the first place, the provision that not more than one dwelling-house shall be erected on a lot was intended to exclude the *erection* of other structures. * * *"
(Italics ours.)

This language, it would seem, left nothing for the court below to do when the case was sent back—it then appearing that the appellee had erected the stable—except to issue a mandatory injunction directing the removal of the stable in question, unless it be admitted that the appellee had gained a “right by stoutly asserting an invalid claim” (*Attorney General vs. Algonquin Club*, 153 Mass., 447; 11 L. R. A., 500):

“It ought not to be in the power of a defendant in an injunction bill to oust the court of its jurisdiction by committing, *pendente lite*, the very acts to prevent which the suit was begun, and such, we think, is the law.” *Lewis vs. North Kensington*, 16 R. I., 15.

The court below, however, held that the use of the stable for business purposes should be enjoined, and refused to issue a mandatory injunction directing its removal, relying entirely on the decision in the case of *Riverbank Improvement Company vs. Bancroft*, 95 N. E., 216.

This case was relied upon by counsel for appellee (see p. 7 of appellee’s brief in No. 2498, April term, 1913) in the former appeal in this case, and is easily distinguished from the present case.

In the *Riverbank Improvement Company* case one of the covenants was:

“First. No buildings other than dwelling-houses (which word shall include club-houses), with the usual outbuildings appurtenant thereto, shall be erected, placed, or used upon the said land * * *.”

It would appear from the decision that a garage had been erected *before the suit was begun* and that it had been used "as a place to keep vegetables, double windows, blinds, and other minor household things, and *was so intended to be used at the time of its erection.*" (Italics ours.) The building itself would seem to have been permitted under the covenant permitting the erection of the "usual outbuildings."

In the case of *Hepburn vs. Long*, 131 N. Y. Supp., 154, it was held that a covenant that "no building or other structure of any kind whatsoever other than a dwelling-house shall ever be erected thereon," was violated by the erection and maintenance of a small private garage 13 x 22 feet in size and fifteen feet from the owner's dwelling-house.

Assuming, however, for the sake of argument, that the covenant in question would permit the erection of a private stable or garage, it is submitted the defendant would be in no better position, since the structure in question was designed for business purposes, and was so constructed, and the mere fact that defendant is restrained from using it as such cannot alter the physical appearance and structure of the building itself. As the plaintiff McNeil states in his testimony (R., 15): "The stable itself is not a thing of beauty in such surroundings; in fact, it is very noticeably out of place."

The same covenant that prohibited the erection of the building in question also prohibits the erection of apartments. If it be held that the stable in question should be allowed to remain, it must necessarily follow that large apartment-houses or other objectionable structures could be erected in the subdivision, and be allowed to remain there, so long as they were not used for their ordinary purposes, destroying the value of the subdivision as a residence district.

If it had appeared from the testimony that the defendant contemplated erecting this stable and no work had been done thereon, or if it had not been completed, the court would undoubtedly have enjoined its erection. The defendant had

actual notice of the covenant in her deed and of the vigorous protests made by the citizens of the subdivision, and indeed at one time, as appears from the testimony adduced by the defendant (R., 18), began to tear the building down, but subsequently altered her decision. Under these circumstances can it be held that the defendant has gained a right by her persistence when the plaintiffs have used the utmost diligence?

“The defendant further contends that the projections are not of sufficient importance to warrant a mandatory injunction or order for their removal. The argument would be of more weight in a case where the defendant had erected a building with unauthorized projections, in ignorance that they were deemed to be unauthorized, and where he was not aware that his right to do so was disputed. Without considering what should be done in such a case, it is enough to say that such is not the case here. If the defendant, after deliberately proceeding in the face of the remonstrances of the officers of the Commonwealth to erect projections which are now determined to be unwarranted, can yet be heard to urge that after all no order for their removal should be passed, it would gain something, not much short of a right by stoutly asserting an invalid claim.” *Attorney General vs. Algonquin Club*, 153 Mass., 447 (453); 11 L. R. A., 500.

“The defendant, since the filing of this bill, has built a wall in the plaintiffs’ passageway, which has been decided to be a violation of their right. * * * The fact that no temporary injunction has been granted does not affect the kind or extent of the remedy to which the plaintiffs are entitled upon establishing their right at the hearing on the merits. The defendant having, by the service of process, full notice of the plaintiffs’ claim, went on to build at his own risk; and the injury caused to the plaintiffs’ estate by the defendant’s wrongful act being substantial, a court of equity will not allow the wrongdoer to compel innocent persons to sell their

rights at a valuation, but will compel him to restore the premises, as nearly as may be, to their original condition." *Tucker vs. Howard*, 128 Mass., 361 (362).

The case of *Morrow vs. Hasselman*, ⁶⁹~~59~~ N. J. Eq., 612, is closely analogous to the present case.

Quoting from the syllabus, which seems to be a correct epitome of the court's decision:

"1. Where the owner of land lays it out in streets and lots, and there is a general plan for the improvement of the streets by a uniform scheme as to the building, and covenants in relation thereto are inserted in the deeds of all purchasers, the same may be enforced by one purchaser against another without proof of special damage.

"2. Immaterial violations of the restrictions, not showing an intention to abandon the plan, are no defense to such action.

"3. Where the complainant gave the defendant notice as soon as it appeared that the latter's building would violate the restriction, but the building was completed after suit for an injunction was commenced, complainant is entitled to a mandatory injunction."

(From the opinion, page 619:) "The completion of the building under these circumstances must be considered to have been at defendant's risk, and complainant is entitled to a mandatory injunction to enforce the covenant."

See also—

Sanborn vs. Rice, 129 Mass., 387.

Krehl vs. Burrell, L. R. 7 Ch. Div., 551.

Same case, L. R. 11 Ch. Div., 146.

Schwoerer vs. Boylston, 99 Mass., 285.

Reimer's Appeal, 100 Pa. St., 182.

In view of the decision of this court on the former appeal and the other decisions to which attention has been called,

it is respectfully submitted that the decree of the court below should be reversed and a decree should be ordered directing the removal of the stable.

Respectfully submitted,

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Attorney for Appellants.

COURT OF APPEALS
DISTRICT OF COLUMBIA
FILED

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Henry W. Hodges.
Clerk.

Court of Appeals, District of Columbia.

OCTOBER TERM, 1914.

No. 2702.

HIRAM C. McNEIL ET AL., APPELLANTS,

vs.

ROY S. GARY, APPELLEE.

BRIEF FOR APPELLEE.

When this case was before this court on appeal from the decision of the court below, sustaining a demurrer to the bill, the only issues raised were those arising as a matter of law upon the face of the bill. (McNeil *et al.* *vs.* Gary, 40 App. D. C., 497.) The facts shown by the answer and testimony place a different aspect upon the case in so far as concerns the question at issue on the present appeal.

In the answer (Record, p. 8), it is alleged that the stable was intended to be used and was used by the defendant to stable a horse used by her solely for family purposes. The testimony of the appellant (p. 15) shows that a number of

other persons have stables used in this subdivision for the stabling of horses, showing that the practical construction of the covenant in the deed does not prohibit the building or use of a stable where it is used as a private stable.

The testimony of the husband of the appellee (Record, pp. 17 and 18) shows that the stable has been used since it was built to stable one horse which belongs to their oldest daughter; that this horse is kept for the use of the family; that the children drive it to Sunday School and in the evenings and use it for riding; that they also keep in the stable a surrey, which is used exclusively for family use, as well as a buggy which they use to drive in the evenings for pleasure, and which the witness used to drive to and from his work and around during the day.

The testimony also shows that the stable was completed shortly after the suit was filed, having been started some six weeks before that. (Gary's testimony, p. 18.)

The appellant testifies (p. 14) "At the time this bill was filed, Mr. Gary's stable, the erection of which this suit is to enjoin, *had not been quite finished.*" The answer to the rule to show cause for a preliminary injunction (Record, p. 6), shows that the attorney for the appellee immediately upon the filing of the suit wrote a letter to the attorney for the appellants notifying him that because there was no bond for the protection of the defendant in respect to the expense incident to the stopping of work, she intended to proceed with the building of the stable, so that had the appellants desired to have stopped the building of this stable, they were given every opportunity of taking appropriate action.

The court below, in a carefully considered opinion, delivered by Mr. Justice Gould, held that while the plaintiffs below were entitled to an injunction, it should not extend beyond the restriction of the use of this stable for business purposes. In support of this conclusion, the opinion refers at length to the case of *Riverbank Improvement Co. vs. Bancroft*, 34 L. R. A., New Series, 730, in which the identi-

cal question was decided by the Massachusetts Supreme Judicial Court. We respectfully request the court to refer to the opinion below (Record, pp. 9 to 11) in connection with the rights of the appellee on this appeal.

Respectfully submitted,

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